

Conversely, respondent argues that claimant did not prove his right inguinal hernia occurred while he was working for respondent. Respondent argues that medical treatment

was provided to claimant contemporaneously with the May 8, 2003 accident and claimant was not diagnosed with a hernia at that time. Respondent further notes a CT scan did not reveal a hernia and claimant was released to return to work by two doctors, neither of whom had diagnosed a hernia. Accordingly, the respondent requests the Board to affirm the ALJ's preliminary hearing Order.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On Thursday, May 8, 2003, claimant was employed as a carpenter for Highland Builders. As he was hooking a compressor to the forks on a Bobcat, the operator of the Bobcat accidentally caused it to swing around hitting claimant across the stomach and groin area. Claimant testified that he was knocked back about 10 to 15 feet. He experienced immediate pain in his stomach and groin area. Claimant testified that night his testicles were swollen and he remained in bed the following two days.

On Sunday, claimant reported the incident to his supervisor, Steve Loomis. Mr. Loomis referred the claimant to Dr. T.M. Venkat for medical treatment. Dr. Venkat saw claimant on three occasions and after the second visit a CT scan was performed. Dr. Venkat had diagnosed claimant with a muscle sprain or strain. The doctor released the claimant to return to work on May 21, 2003, with a 20-pound weight limit. But claimant testified that he was unable to get out of bed on the day he was released to return to work.

Claimant then sought treatment in June with Dr. Patrick J. Allen who suggested a referral to a urologist but claimant never was examined by a urologist. Claimant never saw any other doctors between his one visit with Dr. Allen on June 10, 2003 and the examination by Dr. Pedro A. Murati on September 30, 2003. Claimant testified that the condition in his stomach, groin and testicles gradually worsened every day after he was released from treatment by Dr. Venkat. And claimant denied any intervening accident.

Claimant went to see Dr. Pedro A. Murati on September 30, 2003, for a rating, but the doctor diagnosed claimant with a right inguinal hernia. Based upon claimant's history of injury and without the opportunity to review medical records nor the CT scan results, Dr. Murati opined the hernia was caused by the work-related accident on May 8, 2003. Dr. Murati recommended that claimant obtain a surgical consultation for that condition.

Claimant was seen in the emergency room at Mercy Hospital in Independence, Kansas, on October 17, 2003. The report of that visit indicated claimant had a hernia and did not need further treatment but claimant was told to see his physician for follow-up care. Dr. Richenda D. Herren ultimately repaired claimant's right inguinal hernia on October 28, 2003, and released the claimant to return to work on November 17, 2003.

Dr. Venkat noted that his examination did not reveal the possibility of a hernia and the CT scan of claimant's abdomen did not reveal a hernia. Consequently, Dr. Venkat opined that claimant's inguinal hernia was not related to the injury suffered on May 8, 2003. Dr. Allen saw claimant on June 10, 2003, and released claimant to return to work on June 17, 2003.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>2</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>3</sup>

After claimant suffered his work related accident on May 8, 2003, he received contemporaneous treatment with Dr. Venkat as well as objective testing. Neither the examinations conducted in conjunction with his treatment nor the objective testing revealed a hernia. Claimant was released to return to work but sought additional treatment with Dr. Allen who, after one examination, also released claimant to return to work. Claimant did not see another physician for over three months and then admittedly went to see Dr. Murati in order to obtain a rating rather than for treatment.

The ALJ noted Dr. Venkat opined claimant's hernia was not caused by the May 8, 2003, accident. Based upon that opinion and the absence of diagnosis of a hernia until Dr. Murati's examination, the ALJ determined claimant's hernia was not related to the accidental injury on May 8, 2003. The Board agrees and affirms.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.<sup>4</sup>

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Jon L. Frobish dated February 24, 2004, is affirmed.

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<sup>1</sup> K.S.A. 44-501(a) (Furse 2000).

<sup>2</sup> K.S.A. 2002 Supp. 44-508(g).

<sup>3</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>4</sup> K.S.A. 44-534a(a)(2) (Furse 2000).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2004.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Paul M. Kritz, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director